

BATTLE OF THE FAKES: THE PORTUGUESE DISTRICT ATTORNEY'S GOOD PRACTICE GUIDELINES - ABBC

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In this modern world of global economics and commerce, piracy and counterfeiting are increasingly at the top of both the economic players' and lawmakers' concerns as their impact on business, industry, consumers and the economy in general results in major damages.

The massive flood of counterfeited and pirated goods in international markets, arising from production at an industrial scale, is seriously undermining not only the profits of legitimate producers but also the reputation and trust of brands and the quality of branded products.

All sorts of products are now being counterfeited – from traditional designer clothes and accessories, to drinks, toys, pharmaceuticals and even aeroplane parts. The situation is escalating, as Customs Authorities across Europe seize ever more fakes (128 million in 2007), and the health, safety and welfare of all individuals and families are put at stake.

European companies and industries get their lead in the world economy by an ability to compete relying on innovation, branding and the top quality of their products – when creativity is stolen this edge is lost for the benefit of the pirates.

Nevertheless, economic agents, lawmakers and the general public are beginning to see counterfeiting and piracy for what they really are: thefts carried out by criminal organisations, competing directly with narcotics and weapons trafficking.

This battle against fakes is now being taken very seriously on several fronts. The Enforcement Directive 2004/48/CE is playing a major role, co-ordinating European legislation and providing new tools to fight intellectual property violations, such as provisional measures and injunctions, the broadening of the concept of damages and evidence preserving rules.

Portugal implemented the Enforcement Directive in April 2008, introducing updates to the existing legal framework. Following this trend, in February 2009, the Portuguese Regional Public District Attorney's Office issued new good practices guidelines, to be observed in criminal investigations.

These guidelines aim to simplify and expedite the investigation proceedings, and were issued following the conclusions of a consultation group involving several experienced entities (magistrates, The Portuguese Food and Economic Security Authority and intellectual property rights' holders associations), addressing the practical problems of these investigations.

Guidelines

The Guidelines start by recognising the impact of the phenomenon in the global economy and on the rights holders in particular, as the ones directly damaged. More importantly, the Guidelines acknowledge that these entities are best able to provide the necessary information and support to the authorities, specifically regarding the collecting of evidence, and that their active involvement is essential in any investigation.

En Febrero de 2009, la Procuraduría- General Regional emitió nuevas recomendaciones de "buenas prácticas" a adoptar para los procedimientos criminales de contratación ilícita y piratería, con el objetivo de hacer la investigación más ágil y eficaz; César Bessa Monteiro y Ana Mira Cordeiro de

ABBC afirman que estas recomendaciones surgen a raíz de la creciente toma de conciencia por parte del legislador - nacional y europeo - y del público en general, respecto a las graves implicaciones que las prácticas ilícitas ocasionan, tanto para la economía, como para los consumidores.

Investigators must now contact the National Institute of Industrial Property (INPI) or brand owners associations, to find out who is the relevant brand owner. Then, by a single document, the right holder: i) is notified to present a formal complaint (mandatory); ii) receives all relevant information on the case; and iii) is notified to perform technical inspections of the counterfeited goods.

In certain situations, a mere direct examination suffices to determine that the goods are counterfeited (labelling, packaging, product details, etc). The technical inspection becomes unnecessary and the investigator may waive it, avoiding unnecessary costs and delays. The products may be examined by samples brought to a Court close to the rights holder's location, avoiding unnecessary displacements, and the use of video-conferencing is encouraged.

Attention is also brought to the fact that these investigations may result in evidence of criminal activity on a larger scale, identifying factories, import and export channels, tax evasion schemes and criminal organisations, potentially linked to other types of crimes.

These good practice guidelines, by framing the role of the judicial authorities and motivating them in the pursuit of these violations, represents major progress and are evident signs of the progressive awareness of both lawmakers and the general public to the (commercial, reputational and financial) damage piracy and counterfeiting represent to the economy. Only a change of mentality will enable victory in this battle, but Portugal is on the right track.

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